Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-849

SMITH'S FOOD KING, a corporation,

Petitioner,

vs.

RETAIL CLERKS UNION, LOCAL 1442, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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vs.

RETAIL CLERKS UNION, LOCAL 1442, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner Smith's Food King respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on August 17, 1979.

Opinion Below.

The decision of the Court of Appeals, not yet reported in the Official Reports, is printed in the Appendix hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 17, 1979. A timely petition for rehearing was denied on September 4, 1979,

and this Petition for Certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented.

When an action is commenced by an employer to compel a union to arbitrate the issue of whether its threat to strike violates a no strike clause in a collective bargaining agreement and the strike threat is later revoked, what standard should be applied to determine if the case has become moot?

Constitutional Provision Involved.

The pertinent part of Article III, Section 2 of the Constitution is set forth in the Appendix hereto.

Statement of the Case.

Smith's Food King, the petitioner herein, owns and operates retail supermarkets located throughout the County of Los Angeles, California and elsewhere. (R. 10.)[1]

Retail Clerks Union, Local 1442, the respondent herein, is an unincorporated association functioning as a labor union and is the collective bargaining representative of Smith's Food King employees working as retail clerks in those supermarkets within the Union's jurisdiction. (R. 10.)

Petitioner and respondent are parties to a collective bargaining agreement providing for and establishing the wages, hours, benefits and conditions of employment for the retail clerks employed by the petitioner and represented by the respondent. (R. 11.)

[1]"R" references are to the record in the District Court reproduced as "Volume I, Pleadings."

The agreement contains an arbitration provision which establishes the method for resolving disputes that arise between Smith's and the Union. That provision provides, in pertinent part, that "[a]ny and all matters of controversy, dispute or disagreement of any kind or character existing between the parties and arising out of or in any way involving the interpretation or application of the terms of [the] Agreement" will be submitted to arbitration. (Article XIV(A); R. 38.) The agreement also provides that the decision of an arbitrator shall be final and binding upon the parties, "subject only to their rights under law." (Article XIV(C)(4); R. 39.)

The agreement also contains a "no-strike" clause, which provides as follows:

> "2. Work Stoppages. Matters subject to the procedures of this Article shall be settled and resolved in the manner provided herein. During the term of this Agreement, there shall be no cessation or stoppage of work, lockout, picketing or boycotts, except that this limitation shall not be binding upon either party hereto if the other party refuses to perform any obligation under this Article or refuses or fails to abide by, accept or perform a decision or award of an arbitrator or board." (R. 39.)

In February, 1975, a dispute arose between Smith's and the Union concerning the alleged performance of the Union's bargaining unit work by non-bargaining unit personnel.

In June, 1976, that dispute was submitted to arbitration pursuant to the terms of the Agreement. The decision and award of Arbitrator Meyers, issued on October 27, 1976, was in the Union's favor.

Smith's had argued to the arbitrator that the contract clause relied upon by the Union in support of its grievance was an illegal liquidated damages clause under Section 1670 of the California Civil Code and was, therefore, unenforceable and void. (R. 72.)

Smith's moved to vacate the decision and award of the arbitrator in the Los Angeles Superior Court in May, 1977. When Smith's motion was denied, a timely appeal from the decision of the Superior Court was filed in the California Court of Appeal. (R. 62.)

On June 16, 1977, after the decision of the Superior Court was issued and before an appeal was filed with the California Court of Appeal, the President of the respondent Union sent a letter to the representative of Smith's. The letter declared that Smiths' Food King was in violation of Article XIV, Section D, Paragraph 2 of the Agreement by refusing to comply with the award of arbitrator Meyers. The Union President threatened to strike Smith's Food King stores if the arbitrator's award was not complied with within 48 hours of the receipt of the letter. (R. 86.)

Smith's representative responded to the Union's letter with a telegram explaining that it was the position of Smith's that Article XIV(D)(2) of the Agreement was not meant to interfere with an employer's right to seek judicial review of an arbitrator's award. The telegram demanded that the Union submit its dispute to arbitration. (R. 87.) The Union refused. (R. 16.)

When the Union refused to halt its threatened strike and submit the dispute to arbitration, Smith's filed a complaint for injunctive relief and for specific performance of the Union's agreement to arbitrate all disputes in the Los Angeles Superior Court.

Several days later, the Union filed a petition for removal in the United States District Court, Central District of California, removing the action filed by Smith's for injunctive relief and for specific performance of agreement to arbitrate to that court. (R. 1.) Removal jurisdiction was based upon the fact that federal courts have original jurisdiction over actions arising under Section 301 of the National Labor Relations Act as amended, 29 U.S.C. §185 *et seq.*

On removal to the District Court, Smith's motion for a preliminary injunction was denied and the Union's motion to dismiss Smith's complaint was granted (R. 199), thus rejecting Smith's request for an order compelling arbitration. In order to avoid a strike, Smith's complied with the arbitrator's award, paying all monies required by the award. Smith's also filed an appeal with the Ninth Circuit Court of Appeals.

While Smith's appeal to the Ninth Circuit was pending, and before oral agreement, the decision of the California Court of Appeal issued, reversing the decision of the Los Angeles Superior Court and vacating the decision and award of arbitrator Meyers to the extent that it violated Section 1670 of the California Civil Code.

Holding that ". . . the grievance, the arbitration, and the threatened strike have all been resolved, and no decision of this court could alter the rights of any party," the Ninth Circuit dismissed the petitioner's appeal as moot (Memorandum Decision; Appendix A).

REASONS FOR GRANTING THE WRIT.

The Ninth Circuit's Decision in this case raises the substantial question of what standard the federal courts should use to determine when an action to compel arbitration pursuant to an arbitration clause in a collective bargaining agreement becomes moot. The petitioner contends that the standard adopted by the court below is in direct conflict with the federal labor policy favoring arbitration and with the guidelines issued by this Court for determining whether a matter between an employer and a union should be ordered arbitrated.

The guidelines for determining whether a matter should be submitted to arbitration have been emphatically articulated by this Court in the so-called "*Steelworkers*" trilogy: *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 80 S.Ct. 1347 (1960); and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358 (1960):

In *United Steelworkers of America v. American Manufacturing Co., supra,* the Supreme Court stated:

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. . .
>
> "The courts, therefore, have no business weighing the merits of the grievance [fn.], considering whether there is equity in a particular claim, or determining whether there is particular claim, or

> determining whether there is particular language in the written instrument which will support the claim. . . . The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware." *Id.*, at 567-568 (fn. omitted).

In *United Steelworkers of America v. Warrior & Gulf Navigation Co., supra,* the Court said at 582-583:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. [Fn.]"

And again at 585:

> "[W]e think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator."

Despite these admonitions, the Ninth Circuit found the Petitioner's demand for arbitration moot because the incident which had given rise to its demand, *viz.*, an earlier arbitration and a strike threat, had been

resolved. Rather than look to the language of the arbitration agreement between the parties to determine the legitimacy of the petitioner's claim that the meaing of the no strike clause must be submitted to arbitration, the Court looked to factors external to the collective bargaining agreement and decided that such a determination by an arbitrator was no longer needed and that the case had become moot while on appeal.

A proper analysis of the issue of whether a case or controversy exists, however, rests not on what a court perceives to be the needs of the parties, but rather on the contractual commitments of the parties to one another.

The arbitration clause between these parties is quite broad and inclusive and provides, in pertinent part, that "[a]ny and all matters of controversy, dispute or disagreement of any kind or character existing between the parties and arising out of or in any way involving the interpretation or application of the terms of [the] Agreement" will be submitted to arbitration. (Article XIV(A); R. 38.)

It is quite true that the Union's threat to strike to gain compliance with an earlier arbitration award caused the petitioner to demand that the respondent's and the petitioner's different interpretation of the no strike clause be submitted to arbitration. It is equally true that the union retreated from its strike threat while this case was pending before the Ninth Circuit. Rather than apply the "case or controversy" test to each of these incidents separately to determine whether either the issue of the petitioner's right to injunctive relief or the issue of the petitioner's right to arbitration had become moot, the Ninth Circuit intertwined both incidents to determine its jurisdiction.

The fact that the strike threat may have ended has no bearing on whether the collective bargaining agreement requires that the issue involved in the interpretation of the no strike clause be submitted to arbitration. The obligation of the Union to submit that dispute to arbitration is governed solely by the language of the arbitration clause in the contract between the parties. External events, here the Union's revocation of its strike threat, which may make moot a request for injunctive relief, do not affect a party's contractual obligation unless the contract so provides.

By ruling that the petitioner's demand for arbitration was moot because the threat to strike was revoked, the Court ignored the possibility that arbitration may be available to this and other employers to provide declaratory and interpretative statements of collective bargaining language, even when a particular dispute is resolved but an underlying disagreement remains.

The Ninth Circuit's view that its jurisdiction to review an employer's right to arbitrate issues arising under a collective bargaining agreement is dependent upon external factors rather than on the language of the arbitration agreement severely affects the integrity of such agreements.

In fact, the very vitality of this Court's decision in *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 90 S.Ct. 1583 (1970), permitting federal courts to issue injunctions to restrain strikes that are in violation of no strike agreements, is threatened by the decision that the instant case has become moot. If the Ninth Circuit's decision is not reviewed by this Court, labor unions throughout the United States can threaten strikes, which they will claim do

not violate no strike clauses, in order to have their way in disputes with employers. After an employer has conceded in the face of such industrial blackmail, these unions may revoke their threats to violate a no strike clause and then claim that any employer demands that these threats be arbitrated have become moot. Such actions threaten the durability of *Boys Market,* the *ratio decidendi* for which was later described by this court as the imperative "to implement the strong congressional preference for the private dispute mechanisms agreed upon by the parties." *Buffalo Forge v. United Steelworkers of America,* 428 U.S. 397, 407, 96 S.Ct. 3141, 3147 (1976). If a union is permitted to escape judicial review of its conduct by forcing an employer to concede important issues to it and then claiming that the arbitrability of such conduct has become moot, there will be no reason for an employer to agree to include arbitration clauses in collective bargaining agreements.

The issue presented to this court, therefore, is what standard should the federal courts use to determine if a demand for arbitration over the meaning of a no strike clause has become moot. Should a court be guided by the current status of a union's threat to violate a no strike clause to determine if a demand to arbitrate the legality of such a threat presents a "case or controversy" within the meaning of Article III of the Constitution? Or should the existence of a "case or controversy" be determined by examining the language of the arbitration clause in the collective bargaining agreement between the parties for the purpose of determining whether the clause is susceptible to an interpretation which would present an arbitrable issue between the parties?

The Petitioner contends that the latter standard is the correct one and that this court, in the exercise of its supervisory powers over the federal judiciary, should settle this important question of law.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Dated: November 30, 1979.

Respectfully submitted,

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Smith's Food King.

APPENDIX.

Memorandum.

United States Court of Appeals for the Ninth Circuit.

Smith's Food King, a corporation, Appellant, v. Retail Clerks Union, Local 1442, Retail Clerks International Association, AFL-CIO, an unincorporated association; Doe Individual One through Doe Individual Five Hundred; and Doe Association One through Doe Association Ten (inclusive of all intervening numbers as though each Doe were separately and severally designated), Appellees. No. 77-3377.

Filed Aug. 2, 1979.

Appeal from the United States District Court for the Central District of California.

Before: BROWNING and GOODWIN, Circuit Judges, and EAST*, District Judge.

The grievance, the arbitration, and the threatened strike have all been resolved, and no decision of this court could alter the rights of any party. The case does not fall within the guidelines of *Amalgamated Transit Union, Division 1384 v. Greyhound Lines, Inc.*, 550 F.2d 1237, 1238 n.1 (9th Cir.), *cert. denied*, 434 U.S. 837 (1977).

The appeal is dismissed as moot.

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

Article III, Section 2 of the Constitution.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

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Respondent.

Supplemental Appendix to Petition for Writ of Certiorari.

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Order.

United States Court of Appeals, for the Ninth Circuit.

Smith's Food King, a corporation, Appellant, v. Retail Clerks Union, Local 1442, Retail Clerks International Association, AFL-CIO, an unincorporated association; Doe Individual One through Doe Individual Five Hundred; and Doe Association One through Doe Association Ten (inclusive of all intervening numbers as though each Doe were separately and severally designated), Appellees. No. 77-3377.

Filed: Sept. 4, 1979.

Appeal from the United States District Court for the Central District of California.

Before: BROWNING and GOODWIN, Circuit Judges, and East*, District Judge.

Appellant's petition for rehearing, filed August 17, 1979, has been considered by the court, and is Denied.

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

Order.

United States District Court, Central District of California.

Smith's Food King, a corporation, Plaintiff, v. Retail Clerks Union, Local 1442, Retail Clerks International Association, AFL-CIO, an unincorporated association, etc., et al., Defendants. Case No. 77-2342-WMB.

Filed: July 29, 1977.

This cause came on to be heard on July 18, 1977 at 10:00 A.M. in the courtroom of the Honorable William Matthew Byrne, Jr., Judge of the above-captioned Court, in the United States Courthouse, 312 North Spring Street, Los Angeles, California, on Plaintiff's Motion For Preliminary Injunction and Defendant's Motion to Dismiss, and the Court having considered the pleadings, memoranda of points and authorities, exhibits, affidavits and all other documents on file, and having heard Counsel for the respective parties, and the Court having made and filed its findings of fact and conclusions of law it is

ORDERED that Plaintiff's Motion For Preliminary Injunction be and the same hereby is denied and that Defendant's Motion to Dismiss be and the same hereby is granted and that this case be, and the same is hereby, dismissed.

Dated: July 28, 1977.

/s/ William Matthew Byrne, Jr.
UNITED STATES DISTRICT JUDGE

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

Smith's Food King, a corporation, Plaintiff, v. Retail Clerks Union, Local 1442, Retail Clerks International Association, AFL-CIO, an unincorporated association, etc., et al., Defendants. Case No. 77-2342-WMB.

Filed: Aug. 2, 1977.

The above-captioned matter came on for hearing on July 18, 1977 before the Honorable William Matthew Byrne, Jr., Judge of the above-named Court, in the United States Courthouse, 312 North Spring Street, Los Angeles, California; the Court having considered the pleadings, memoranda of points and authorities, exhibits, affidavits, and all other documents on file herein, and having heard counsel for the respective parties, hereby finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. Plaintiff, Smith's Food King, is a Utah corporation doing business in the State of California and owns and operates a chain of retail grocery stores.

2. Defendant, Retail Clerks Union, Local 1442, chartered by and affiliated with Retail Clerks International Association, AFL-CIO, is an unincorporated labor association in which employees participate and which exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.

3. Plaintiff and Defendant entered into an executed, written collective bargaining agreement on or about July 28, 1975, for a term of agreement extending

through July 30, 1978. Said agreement provides for and establishes wages, hours, benefits, and other working conditions for retail clerks employed by Plaintiff, which employees are represented by Defendant.

4. Said agreement contains a grievance and arbitration procedure at Article XIV for the disposition of all grievances. Said Article XIV specifically provides that whenever any grievance cannot be resolved between the parties, the dispute shall be submitted to an impartial arbitrator for his final and binding determination.

5. Article XIV also contains a no strike clause, which provides that during the term of this agreement, there shall be no cessation or stoppage of work, lockout, picketing or boycotts. However, there is a specific exception contained in that clause which states that this limitation is not binding on either party if the other party refuses or fails to abide by, accept or perform a decision or award of an arbitrator or arbitration board.

6. In or about March, 1975, a dispute arose between Defendant and Plaintiff concerning performance of bargaining unit work by non-bargaining unit personnel. More specifically, employees of employers other that Plaintiff, *i.e.*, drivers or salesmen of suppliers, were performing work in Smith's Food King stores, which work belongs to retail clerks who are covered by this collective bargaining agreement.

7. In or about August, 1975, the Union and the employer agreed to arbitrate the dispute and on or about August 29, 1975, the parties selected Frederic Meyers as the impartial arbitrator.

8. A hearing was held on June 11, 1976 in Los Angeles, California, and on October 27, 1976, Arbi-

trator Frederic Meyers rendered his award upholding the Union's grievance and awarding damages as per the governing terms of the agreement. On or about October 27, 1976, Arbitrator Frederic Meyers served said award upon the parties.

9. On January 14, 1977, Defendant filed a Petition To Confirm Arbitration Award in the Superior Court of California, County of Los Angeles. On February 28, 1977, Defendant filed a Notice of Motion and Motion For Order Confirming Arbitration Award, along with supporting points and authorities.

10. On March 4, 1977, Defendant filed a Memorandum of Points and Authorities in Opposition to the Petition to Confirm the Arbitration Award.

11. On March 21, 1977, said petition to confirm was heard by The Honorable George M. Dell, Judge of the Superior Court of the State of California for the County of Los Angeles, in Department 82 thereof. On that date, a minute order was entered granting the Petition to Confirm the Award.

12. On May 19, 1977, the Superior Court of the State of California for the County of Los Angeles, after considering the Union's proposed Findings of Fact and Conclusions of Law and Proposed Judgment, and after rejecting all material objections to said Findings of Fact and Conclusions of Law and Judgment offered by Plaintiff, filed the original Judgment Confirming Award of Arbitrator and the Findings of Fact and Conclusions of Law. On May 20, 1977, the Superior Court entered judgment, and sent a Notice of Entry to Counsel for both parties.

13. On or about June 16, 1977, Michael A. Straeter, President, Retails Clerks Union, Local 1442, directed a letter to the Food Employers Council, Inc.

stating that Plaintiff is in violation of Article XIV, Section B, Paragraph 2 of the collective bargaining agreement by non-compliance with Arbitrator Frederic Meyers' award rendered on October 27, 1976. The letter goes on to state that if compliance with the award is not rendered within 48 hours of receipt of the letter, Plaintiff could expect a strike sometime thereafter.

14. On June 21, 1977, Plaintiff filed in Superior Court a Complaint for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction, and for Specific Performance of Agreement to Arbitrate, and on that same date sought a Temporary Restraining Order and also filed a Memorandum of Points and Authorities and Declarations. An ex parte hearing was held that afternoon, at which time no restraining order was issued; the matter was set down for an Order to Show Cause on June 30, 1977, in Department 85 of the Superior Court.

15. On June 24, 1977, Defendant filed in the United States District Court for the Central District of California a Petition for Removal of Civil Action, attaching thereto copies of all documents filed in the State Court Action, a Notice of Filing of Petition and Bond for Removal, and on that same date delivered a copy of said Petition and Notice to the Clerk of the Superior Court.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this action under Section 301 of the National Labor Relations Act, as amended, 29 U.S.C. §185 without regard to the amount in controversy.

2. The provisions of the Norris-LaGuardia Act, 29 U.S.C. §101 *et seq.* govern the case at bar, in that this Court does not have jurisdiction to issue any restraining order or temporary or permanent injunction growing out of or involving the labor dispute between Plaintiff and Defendant, in that this case is not within any of the statutory or judicial exceptions to said Norris-LaGuardia Act.

3. The narrow exception to the Norris-LaGuardia Act prohibition against injunctions in labor disputes carved out by the United States Supreme Court in *Boys Markets, Inc. v. Retail Clerks Union, Local 770,* 398 U.S. 235 (1970) does not apply to the case at bar. The essence of the *Boys Markets* exception and the key to the issuance of a Boys Markets injunction is a finding that the issue underlying the work stoppage is subject to the arbitration clause of the applicable agreement and that a party to that agreement undermines the effectiveness of the arbitration machinery by engaging in the work stoppage and thereby forces the grievance to be resolved by economic pressure and not by the reasoned decision of an arbitrator for which the parties have bargained. These factors are not present in this case, in that the dispute underlying the threatened work stoppage here, *i.e.*, the Plaintiff's failure to abide by the arbitration award, is not even remotely subject to the arbitration procedure.

4. Numerous circuit courts including the Ninth Circuit in *Martin Hageland, Inc. v. United States District Court,* 460 F.2d 789 (9th Cir. 1972), and the United States Supreme Court in *Buffalo Forge Company v. United Steel Workers of America,* 428 U.S. 397 (1976) have emphasized the narrowness of the *Boys Markets* exception and have held that there is no general Federal

anti-strike policy. These cases held that the *Boys Markets* left the strictures of the Norris-LaGuardia Act undisturbed, absent a contractual obligation on the part of both parties to submit to compulsory arbitration.

5. In the instant case, the parties have already, by mutual consent, gone through the arbitration process and the award of the arbitrator has been confirmed by the Superior Court of California for the County of Los Angeles and thereby converted into a judgment. The Union has done what it is required of it under the agreement to peacefully resolve the controversy. The application by Defendant to confirm the award of Frederic Meyers is not part of the arbitration proceeding; there is no issue now ripe for arbitration, and with arbitration now complete, the Union has turned to various other methods to compel compliance with that award, *State of New York v. Local 144*, 410 F.Supp. 225 (S.D.N.Y. 1976). A work stoppage or the threat of such work stoppage is, under the circumstances presented herein, entirely lawful under the collective bargaining agreement and applicable law.

WHEREFORE, an order denying Plaintiff's Motion For A Preliminary Injunction and granting Defendant's Motion to Dismiss will be issued in favor of Defendant, and judgment will be entered in conformity therewith. Dated: July 30, 1977.

/s/ William Matthew Byrne, Jr.
UNITED STATES DISTRICT JUDGE

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Respondent, Retail Clerks Union, Local 1442, Retail Clerks International Association, AFL-CIO, an unincorporated association, respectfully prays that the Petition for Writ of Certiorari herein be denied.

Opinion Below.

The opinion of the United States Court of Appeals, Ninth Circuit, which is not yet officially reported, is printed in the Appendix to the petition herein.

Question Presented.

The only question raised by the petition is what standard should be applied to determine if a case has become moot in a situation where the underlying labor dispute between the parties has long since been conclusively determined.

Statement of the Case.

Petitioner, Smith's Food King, owner and operator of a chain of retail grocery stores, and Respondent, Retail Clerks Union, Local 1442, an unincorporated labor association, are parties to a written collective bargaining agreement providing for and establishing wages, hours, benefits and other working conditions for retail clerks employed by Petitioner (R. 188-189).

In 1975, a dispute arose between the parties concerning performance of bargaining unit work by non-bargaining unit personnel. More specifically, employees of employers other than Petitioner, i.e., drivers or salesman of suppliers, were performing work in Petitioner's stores, which work belongs to retail clerks who are covered by this agreement (R. 190). This dispute was submitted to arbitration, and on October 27, 1976, Arbitrator Frederic Meyers rendered an award upholding the Union's grievance (R. 190).

In January of 1977, Respondent filed a petition to confirm that award in the Superior Court of California, County of Los Angeles (R. 190). On March 21, 1977, the State Superior Court entered an order granting the petition to confirm, and on May 20, 1977, that court entered a judgment in accordance therewith (R. 191). Petitioner appealed that judgment to the California Court of Appeal (R. 62). On October

3, 1978, while the instant matter was on appeal to the Ninth Circuit, the State Appellate Court modified the Superior Court judgment and affirmed as modified. The text of that order is set forth in the Appendix hereto. No appeal was filed by either party with respect to that order.

On or about June 16, 1977, which was after the State court judgment had been entered, but before any appeal was filed with the State Appellate Court, the President of Retail Clerks Union, Local 1442, informed Petitioner in writing of the possibility of economic action in the event that Petitioner continued to fail and refuse to abide by the arbitration award (R. 191). The possibility of concerted economic action was initiated pursuant to the specific exception to the no strike clause of the collective bargaining agreement in a situation where the employer fails to abide by an arbitration award, Article XIV, Paragraph D, Section 2 (R. 39).

On June 21, 1977, Petitioner filed in the Superior Court, State of California, County of Los Angeles, a Complaint for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction, and for Specific Performance of Agreement to Arbitrate. On that same date, Petitioner sought a temporary restraining order, and following an ex parte hearing, no restraining order was issued. The matter was set for an order to show cause (R. 191-192). Prior to the hearing on the order to show cause, Respondent removed that case to the United States District Court, Central District of California. The District Court denied Petitioner's Motion for Preliminary Injunction and granted Respondent's Motion to Dismiss (R. 182-183).

The United States Court of Appeals for the Ninth Circuit dismissed Petitioner's appeal from that order as moot, holding:

> "The grievance, the arbitration, and the threatened strike have all been resolved and no decision of this court could alter the rights of any party. The case does not fall within the guidelines of *Amalgamated Transit Union, Division 1384 v. Greyhound Lines, Inc.*, 550 F.2d 1237, 1238 n.1 (9th Cir.), *cert. denied*, 434 U.S. 837 (1977)." (Appendix to Petition for Writ of Certiorari).

The United States Court of Appeals for the Ninth Circuit denied Petitioner's Petition for Rehearing (Supplemental Appendix to Petition for Writ of Certiorari, page 1).

REASONS FOR DENYING THE WRIT.

The instant Petition arises out of Petitioner's desire to obtain an advisory opinion from an arbitrator as to the rights, in the abstract, of the parties to the collective bargaining agreement with respect to the scope of the no-strike clause.

It is undisputed that no strike threat currently exists or has existed for an extended period of time, in that the very dispute which led to the possibility of economic action initially was conclusively resolved by the California Court of Appeal in October, 1978. As Petitioner candidly acknowledges, there is simply no dispute of any sort remaining between the parties (Petition for Writ of Certiorari, page 9). In these circumstances, as will be demonstrated more fully below, it is clearly frivolous to suggest, as does Petitioner, that the Ninth Circuit erred in declaring the case moot.

The exclusive contention in the petition is that the Ninth Circuit applied the "wrong standard" in determining that this case is moot. The petition does not cite a single case in support of this contention and, perplexingly, does not even suggest with any clarity what standard properly should have been applied by the Court below.

The standard for determining whether a case is moot is not so mysterious. As stated in *Roe v. Wade*, 410 U.S. 113, 125, 93 S.Ct. 705 (1973), "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." Where no actual controversy exists at such stages, the

dispute must be "capable of repetition, yet evading review." *Roe v. Wade, supra,* quoting *Southern Pacific Terminal Co. v. I.C.C.,* 219 U.S. 498, 515, 31 S.Ct. 279 (1911).

The Petition admits that no dispute has existed between the parties during any stage of appellate review (Petition for Writ of Certiorari, pages 7-8, 9). Likewise, there is not a scintilla of evidence, and the Petitioner does not allege, that the Union has renewed the strike threat or even intimated that such strike threat may be renewed. And it would be absurd to suggest that the Union may do so in the future, both because the California Court of Appeal has fully resolved the dispute which allegedly compelled Smith's to demand arbitration and because Smith's has fully complied with the judgment of the Los Angeles Superior Court and the award of Arbitrator Meyers. Further, there is no claim that any affiliated Union has threatened to strike any employer in the industry over this or any similar issue at any time before or after the instant dispute arose.

What, then, is the Petitioner seeking? A review of the Petition reveals that Petitioner is disguising as an arbitrable dispute its wish to secure a purely advisory opinion regarding an issue about which there is, at best, only an abstract academic, disagreement. Instead of arguing that the dispute herein is unresolved and not moot, Petitioner advances the novel theory (for which it cites no case or statutory authority) that arbitration should be "available to this and other employers to provide declaratory and interpretive statements of collective bargaining agreements, even where a particular dispute is resolved. . . ." (Petition for

Writ of Certiorari, page 9.) Stripped of rhetoric, Petitioner is arguing that, as a matter of law, a labor dispute is not moot, even if no actual controversy exists, if an employer happens to desire an advisory interpretation of the meaning of the contract. This argument, in addition to being simply preposterous, was never raised by Petitioner at any stage of this proceeding.

To justify its position that it has an absolute right to seek advisory arbitral opinions, Petitioner argues that a holding to the effect that the Union need not arbitrate the issue of the scope of the no-strike clause would fly in the face of "strong congressional preference for the private dispute settlement mechanisms agreed upon by the parties", in the language of *Buffalo Forge v. United Steelworkers of America,* 428 U.S. 397, 407, 96 S.Ct. 3141, 3147 (1976). This argument is astonishingly hypocritical. Such a position would likely precipitate an endless cycle of abstract arbitrations and would clearly frustrate not only the grievance and arbitration machinery in the collective bargaining agreement, but also the strong national policy in favor of arbitration as a means of resolving labor disputes.

Of course, it is also clear that Petitioner's argument on this point is irrelevant and unpersuasive with respect to the issue of mootness, which is the only issue raised herein and, in addition, serves only to accentuate the weakness of Petitioner's position. As the District Court stated in its findings (R. 192-193; 193-194):

> "3. The narrow exception to the Norris-LaGuardia Act prohibition against injunctions in labor disputes carved out by the United States Supreme Court in *Boys Markets, Inc. v. Retail*

Clerks Union, Local 770, 398 U.S. 235 (1970) does not apply to the case at bar. The essence of the *Boys Markets* exception and the key to the issuance of a Boys Markets injunction is a finding that the issue underlying the work stoppage is subject to the arbitration clause of the applicable agreement and that a party to that agreement undermines the effectiveness of the arbitration machinery by engaging in the work stoppage and thereby forces the grievance to be resolved by economic pressure and not by the reasoned decision of an arbitrator for which the parties have bargained. These factors are not present in this case, in that the dispute underlying the threatened work stoppage here, i.e., the Plaintiff's failure to abide by the arbitration award, is not even remotely subject to the arbitration procedure."

. . .

"5. In the instant case, the parties have already, by mutual consent, gone through the arbitration process and the award of the arbitrator has been confirmed by the Superior Court of California for the County of Los Angeles and thereby converted into a judgment. The Union has done what it is required of it under the agreement to peacefully resolve the controversy. The application by Defendant to confirm the award of Frederic Meyers is not part of the arbitration proceeding; there is no issue now ripe for arbitration, and with arbitration now complete, the Union has turned to various other methods to compel compliance with that award. *State of New York v. Local 144,* 410 F.Supp. 225 (S.D.N.Y. 1976).

A work stoppage or threat of such work stoppage is, under the circumstances presented herein, entirely lawful under the collective bargaining agreement and the applicable law."

Conclusion.

For each of the above reasons, it is respectfully submitted that the Petition for Writ of Certiorari herein should be denied.

DATED: December 27, 1979

Respectfully submitted,

ROBERT W. GILBERT,

Counsel for Respondent, Retail Clerks Union, Local 1442, Retail Clerks International Association, AFL-CIO.

RONALD J. COOKE,
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ROBERT W. GILBERT, a Law Corporation,
Of Counsel.

GILBERT (ADD) 37273 TAPE 1 LH 12-28

APPENDIX.

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

RETAIL CLERKS UNION, Petitioner and Respondent, v. FOOD EMPLOYERS COUNCIL, etc., et al., Appellants. 2 Civ. No. 52343 (Super. Ct. No. C-188,844).

Filed Oct. 3, 1978.

APPEAL from a judgment of the Superior Court, Los Angeles County. George M. Dell, Judge. Modified and affirmed.

McLaughlin & Irvin, Timothy F. Ryan and Steven R. Feldstein for Appellant Smith Food Markets.

Robert W. Gilbert, a Law Corporation, Robert W. Gilbert and Ronald J. Cooke for Petitioner and Respondent Union.

This is a companion case to *Retail Clerks Union v. Food Employers Council*, Civ. No. 52312, which we have decided by an opinion filed concurrently herewith. It involves the same underlying collective bargaining agreement and the same contentions as we dealt with in that case. For the reasons discussed in that opinion, the judgment in this case must be modified.

There is one factual difference between the present case and the other case. In the case at bench, there were four violations within the six-month period after a warning notice. Applying the increased damage provision which we held to be illegal in the other opinion, the arbitrator awarded the total sum of $729.72. Using the figures set forth in the record, a legal award would have been only $24.54. ($6.1345 x 4.) We modify the judgment accordingly.

The judgment is modified by substituting the figure $24.54 for the figure $729.72 set forth therein; as so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

KINGSLEY, *Acting P.J.*

We concur:

JEFFERSON (Bernard), *J.*

ALARCON, *J.*